£458,500 from the Broad Street Press, knowing it to have been fraudulently obtained, which is one of the crimes enumerated in the Treaty of 1889. (Malloy's Treaties, Vol. I, p. 740.)

One of Factor's co-conspirators, Arthur Klein, was also charged with receiving £330,737.15 from the Broad Street Press knowing it to have been fraudulently obtained. Klein was apprehended November 11, 1930, in New York. He was committed for extradition, Judge Knox denied his application for a writ of habeas corpus. (See his opinion in the appendix hereto.) The Circuit Court of Appeals affirmed the judgment (*U. S. ex rel. Klein* v. *Mulligan,* 50 Fed. (2d) 687), and this Court denied his application for a writ of certiorari (284 U. S. 665). Klein was surrendered to England where he is serving his sentence for his part in the crime. The opinion of the Court of Criminal Appeal in England appears in the appendix hereto and is added because of its treatment of the facts.

Another co-conspirator, Harry Geen, alias Green, was also charged with receiving money from the Broad Street Press knowing it to have been fraudulently obtained. He was apprehended in Philadelphia. Judge Dickinson committed him for extradition and denied his petition for a writ of habeas corpus. (The opinion appears in the appendix hereto.) The *Geen case* is referred to because not only was he charged with the same offense charged against Factor and Klein, but it was contended in his case as in the *Factor case* that there was no State statute making it criminal to receive money knowing it to have been fraudulently obtained. Judge Dickinson held that verbal identity was not essential and consequently that certain Pennsylvania statutes fulfilled the requirement. Geen appealed to the United States Circuit Court of Appeals, but after briefs had been filed and the matter orally argued, the

appeal was withdrawn. This followed shortly after the Circuit Court of Appeals decided against Factor. The United States recognized its obligation to surrender Geen, and on his return to England he was convicted for his part in the crime.

In the *Factor case,* the demanding government finished the presentation of its evidence and had the depositions printed for the convenience of the Commissioner by June 17, 1931, and thenceforward sought to have the matter decided, but a variety of motions, objections and evidence interposed on Factor's behalf over the Government's objections delayed the Commissioner's decision until December 28, 1931. An order committing Factor was entered January 12, 1932, and the record was sent to the Secretary of State.

In July, 1931, while the matter was still pending before the Commissioner, Factor filed a petition for a writ of habeas corpus urging that the act charged against him, *i. e.,* receiving money knowing it to have been fraudulently obtained, while admittedly criminal in England and enumerated in the treaty, was not criminal in Illinois. Judge FitzHenry heard the matter and delivered an oral opinion which appears in the appendix hereto. In that hearing, the demanding government moved to strike the petition on the ground that in the case of *Kelly* v. *Griffin,* 241 U. S. 6, 15, it had already been decided that receiving money knowing it to have been fraudulently obtained was criminal in Illinois and warranted extradition. Factor took an appeal from Judge FitzHenry's decision and later moved to dismiss the appeal, which was granted by the Circuit Court of Appeals after the committal for extradition.

On several occasions before the Commissioner dismissal of the proceeding was sought on the ground that the act

charged was not criminal in Illinois. This phase of the case was extensively argued by counsel on both sides and given exhaustive consideration by the Commissioner. Over the vigorous objection of the demanding government, Factor was permitted to produce five so-called "legal experts" to testify that the case of *Kelly* v. *Griffin*, 241 U. S. 6, 15, was erroneously decided and that it was not criminal in Illinois to receive money knowing it to have been fraudulently obtained. Opposing counsel on page 18 of their petition state that the demanding government was given leave to call expert witnesses but did not do so. Not only were the contentions of Factor's partisan witnesses met with higher and more respectable authority in the decisions of this court, Judge Landis and Judge FitzHenry, but we dared not accede to a practice that would make a farce of an extradition case and resolve every decision according to the ability of fugitive and the demanding government to produce eminent lawyers or judges to instruct the examining magistrate as to the law. These experts produced by Factor agreed only on one point, *i. e.*, that it was not criminal to receive money knowing it to have been fraudulently obtained. One thought the Mr. Justice Holmes erroneously decided the *Kelly case*. Another said it was dicta and therefore not binding. Yet another said it was a question of fact and therefore not binding. Opposing counsel realize the weakness of their attack upon the *Kelly case* and now add another reason. It is now said that Mr. Justice Holmes had in mind a statute other than that which the lower Court very clearly relied upon. But arrayed against the contention of Factor's counsel are the judgments of the Commissioner, Judge FitzHenry, Judge Dickinson and Judges Alschuler and Sparks of the Court of Appeals. The Commissioner's decision appears on page 64, Vol. I, Trans.

Factor's second application for a writ of habeas corpus was heard by Judge Carpenter who refused to follow the decision of his colleague, Judge FitzHenry, and discharged Factor. The demanding government and the United States Marshal appealed to the United States Circuit Court of Appeals where the District Court's ruling was reversed. Factor's next move was to petition the Court of Appeals to set aside all the proceedings on the ground that the United States and Great Britain had entered into a new treaty repealing the treaties under which the present extradition proceeding was pending. The demanding government takes the view that the new treaty is not in force, but assuming it to be in force, it would not impair proceedings pending under the old treaties. The Circuit Court of Appeals without dissent decided against Factor, holding that while it could not, on the evidence submitted to it, determine whether or not the new treaty was in force, even if it were, it carried forward all of the provisions of the old treaties and would not impair pending proceedings.

While the petitioner addresses this Court in the name of Factor, in reviewing the evidence it must be remembered that he never used that name but masked his actions under his various aliases, *viz.,* Wise, Walker, Guest and Frazier. The adequacy of the evidence to sustain the charge is not questioned. In effect he confesses that he has committed the crime of receiving £458,500 from the Broad Street Press knowing it to have been fraudulently obtained and admits that it is a treaty crime, but argues that he should not be extradited because what he did is not supposed to be criminal in Illinois. At first glance it might seem unnecessary to review the evidence at all, but in order to understand what is meant in England by charging that the money which Factor received had been "fraudulently obtained," we must know what frauds the Press and its agents committed. The Broad Street Press and its agents

used various devices to obtain the money and property of its customers, all of which acts are characterized in England as "fraudulently obtained." Viewed individually and from the standpoint of Illinois law, we find one device to be false pretense, another a larceny or embezzlement, yet another a larceny by bailee or broker, in consequence of which the Illinois statute on receiving stolen property and the fraudulent conveyance act are directly applicable. Opposing counsel have constantly striven to make us limit the interpretation of the charge to receiving money knowing it to have been obtained by false pretense, because the statute on receiving in Illinois apparently does not cover such a situation. But in the *Kelly case* (241 U. S. 6, 15) the fraudulent conveyance statute was held to make it criminal to receive money knowing it to have been obtained by false pretense. We have refused to limit the interpretation of the charge and when it is viewed in the light of the facts, it is apparent that Factor has been guilty of a great number of offenses recognized as criminal in Illinois.

In the latter part of 1928, Factor had the Broad Street Press incorporated. He chose as its directors men whom he scarcely knew. They exercised no control over the company, and really did nothing but sign blank checks of the company which they gave to Factor. The name of one of these directors was used for a time as editor of the financial journal which the Press published, but this director, Osborne, in fact had nothing to do with the publishing of the paper. The other director, Paris, never visited the offices of the Press. Neither knew that the Press had been selling shares of stock until a number of suits were started against the company in the fall of 1930. The affairs of the company were then put into the hands of the official liquidator.

The offices of the Press were moved about with frequency and sometimes were designated with fictitious names. The name of the financial journal was first "The City News and Stock Exchange Observer," then "Finance and Stock Exchange Observer," and then "Finance." The putative editor of "Finance" was Norman D. Spencer, a fictitious person. From its incorporation in 1928 up to about March, 1930, the Press acted as broker for its customers in buying and selling stocks listed on the London Stock Exchange. During this period, the aim of Factor and his confederates was not only to gain a following but they sought to profit by inducing their clients to invest in listed shares which they were manipulating. Having blocked the dealing in a particular issue by obtaining an option on practically the entire stock, these conspirators by wash sales would advance the price of the stock. This served a twofold purpose. The stock salesmen and the editor of the Press had fulfilled their representations to customers that "Spencer," the editor, had peculiar sources of inside information and could predict the trend of the market. A profit was made over the price at which the conspirators were able to obtain the stock under their option. However, these schemes ran into difficulty, for the Exchange would invariably suspend dealings in the stock where it became apparent that wholesale manipulation was taking place. Every stock which this band dealt in was suspended by the Exchange. In March, 1930, a new plan was evolved. A following had been built up through the distribution of the Press' journal. This journal was issued every week, the circulation being anywhere from 5,000 to 380,000 copies. The bulk of this distribution was gratis. The income of the Press from its incorporation in 1928 up to March, 1930, was only £7,128 whereas it made a net profit of £1,159,915 from March, 1930, to October, 1930, of which amount Factor re-

ceived £709,000, the £458,500 here involved being part of the latter sum. He sent £200,000 in British War Bonds to his mother-in-law in Chicago. This huge profit was made in the sale of the stock of three companies brought into being by this gang for the purpose of sale to the customers of the Press. Factor's underlings and salesmen did not seek to sell the stock of these three companies until an initial sale had been made to the customer of a listed share. After this share had been held about two weeks, the customer was advised that a profit had been made, and it was recommended that the profit be taken and the proceeds invested in the unlisted worthless stock. In March, 1930, there was brought into existence the Asbestos & Holding Trust Ltd., the first of the fraudulent concerns. Customers who had been sold a listed security such as Phantestra, Ltd., were told that they had made a profit and that it was advisable to sell and reinvest the entire proceeds in Asbestos & Holding Trust Ltd. Numerous customers followed this advice. The Press was able to unload the entire capital of Asbestos Ltd. in this way within a couple of months. The next company brought into being was the Vulcan Copper Mines. Customers who had purchased Edison Bell and Guy Motor shares were told to take their profits in these listed shares and reinvest the proceeds in the Vulcan stock. So successful was Factor and his confederates that the Press disposed of more shares of Vulcan stock than were authorized by law. Consequently some customers were given shares in the Rhodesia Border Mining Corporation the third and last fraudulent company used by this gang. The balance of the Rhodesia stock was sold to customers who had previously purchased listed stocks such as Swears and Wells, Triplex and Godfrey Phillips. In the *Klein case*, Judge Knox and the Circuit Court of Appeals characterized this procedure as "bait-

ing'' the victims. The Press received from the sale of the Asbestos stock £297,405.18.6 (Trans. Vol. 1, p. 187), from Rhodesia stock £623,790.10 (Trans. Vol. 1, p. 188); and from the Vulcan stock £694,452.7.6 (Trans. Vol. 1, p. 177).

In accomplishing this fraud the Press was held out as doing a brokerage business, whereas in fact it was selling the shares as principal. Where it advised a customer that he had made a profit in his first transaction in a listed share and he asked for his profit, the Press refused to give it to him, and thus was guilty of a fraudulent conversion. If a customer refused to reinvest the proceeds in Asbestos, Vulcan or Rhodesia stock, his direction was disregarded and he was sent shares in one of the three concerns anyway. Customers who consented to invest in the Vulcan shares were given Rhodesia shares after all of the Vulcan shares had been disposed of. The Press received money to invest in the listed shares but simply converted it and when the purchaser requested delivery of the stock purchased, the Press either disregarded the request or had to delay delivery until the share could be obtained. The victims were told that Spencer, the fictitious editor, had peculiar sources of inside information; that he had investigated the stock which he recommended and that they were safe; that such stocks would shortly be introduced on the London Stock Exchange, which carriers with it the import of genuineness and worth; that a group of financiers was endeavoring to obtain control of the Vulcan and Rhodesia companies and were offering 15/ per share whereas Spencer could get the share for the customer for 10/; that the stocks were certain to increase in value and the transaction would be a matter of only sixty days; that the companies owned valuable properties and mines which had been opened up and found to be pay-

able mines, and ore had been recently taken from one yielding twelve per cent copper, and the company engineer had gone to South Africa to take charge of the work. The customer was told that Spencer was rewarding him because of confidence reposed in Spencer, by setting aside additional shares which the customer might have at a price less than that offered in other quarters and less than the introductory price on the Exchange. Circulars purporting to be copies of reports of the companies made to government officials to comply with the Companies Act were given to the customers. These contained false and fraudulent information and manifestly were not genuine reports in compliance with any statute, but it was recognized that the form employed was an additional lure and imported verity.

The sales were made by use of the mails, by telegraph, by telephone and through salesmen. Factor himself never made direct contact with the victims except that he, Klein and Geen occupied an office called the "Board Room" where they interviewed inquirers for Norman Spencer, the editor. All of the witnesses agreed that Factor controlled and dominated the Press and the other members of the gang. When Factor fled from England, customers were advised that Mr. Spencer had left for Europe for health reasons. Factor's account at the North of Scotland Bank showed deposits in 1930 of over £1,200,000, but he reduced his deposit to a mere £32.40. All of this occurred about the time that Scotland Yard was making an investigation and suits were being instituted by the victims against the Press. The British official receiver has been appointed to liquidate the Vulcan and Rhodesia Companies as well as the Broad Street Press. His investigations have disclosed that the stocks are worthless; that no properties are owned and that the various representations made to the victims are false and fraudulent.

ARGUMENT.

Point I.

Factor has been charged with a treaty crime and does not contend that the evidence fails to sustain the charge. Hence no adequate reason is given why this Court should review the matter.

We shall concede for the sake of this hearing that Factor's counsel have correctly stated the law in Point I, except that we believe a Federal law denouncing the act as criminal supplies the alleged requirement of local criminality.

(a) The complaint complies with the treaty, the Federal statutes and the authorities.

Points II and III of the petitioner's brief question the adequacy of the complaint on account of its alleged failure to charge an offense criminal in Illinois. No authority is cited in support of the contention that the complaint must charge an offense locally criminal or follow the form of a local indictment. If opposing counsel are content to limit the question to the complaint itself, their proposition collapses from lack of authority. This very form of complaint was honored and successfully used in the *Klein* and *Geen cases*. To require that the complaint follow the form of indictments used in the asylum state is to ignore the practical question frequently encountered of not knowing in what state the fugitive will be found. Governed by such a rule, it would be literally impossible to draft such a complaint as would meet the many different requirements in the forty-eight states of the Union. A complaint might

be made in Illinois; the fugitive flees from that state and is located in Pennsylvania. This was true in the *Geen case* and is a situation frequently arising. Under the ruling of this Court, the fugitive is entitled to have his hearing in the district where he is found. The federal statute is decisive of the question of the complaint. Section 651, Title 18, U. S. C. A. provides that "whenever there is a treaty • • • any • • • commissioner may upon complaint • • • charging any person • • • with having committed • • • any of the crimes provides for by such treaty or convention, issue his warrant • • •." The complaint against Factor unmistakably charges him with the treaty crime of receiving money knowing it to have been fraudulently obtained. (Vol. I, Malloy's Treaties, p. 740.)

Moreover this Court has steadfastly refused to review error in a habeas corpus proceeding. In *Yordi* v. *Nolte*, 215 U. S. 227, it was held that

> "if the offense be one of the treaty crimes, and if it be stated clearly and explicitly so that the accused knows exactly what the charge is, the complaint is sufficient to authorize the commissioner to act."

It was further said, page 232, that

> "the evidence produced at the hearing justified the detention of the accused and corrected any irregularity in the complaint."

Quoting from *Nashimura Ekiu* v. *U. S.*, 142 U. S. 651, 662, the Court said that

> "a writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the Government is shown, he is not to be discharged for defects in the original arrest or commitment."

In re Adutt, 55 Fed. 376, the Court said of a complaint that

> "it is of course necessary that the substance of the offense should be declared so that the court can see that the particular crime charged is one enumerated in the treaty,"

adding that the insufficiency of the allegations of the complaint are for the commissioner and does not go "to the jurisdiction of the commissioner to entertain the complaint."

This Court has frequently held in extradition cases that it will not inquire into the adequacy of the evidence, but only into the jurisdiction of the committing magistrate. *McNamara* v. *Henkel,* 226 U. S. 520, 523; *In re Oteiza* v. *Cortes,* 136 U. S. 330, 334; *Bryant* v. *U. S.,* 167 U. S. 104, 105.

In the case of *Fernandez* v. *Phillips,* 268 U. S. 311, Mr. Justice Holmes in speaking of the writ of habeas corpus says:

> "That writ, as has been said very often, cannot take the place of a writ of error. It is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing and habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."

In *Terlinden* v. *Ames,* 184 U. S. 270, the Court says, page 279:

> "On the face of the complaint extraditable offenses were charged to have been committed, * * *

Generally speaking, 'whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged and that it constitutes an extraditable crime, cannot be reviewed on the weight of the evidence and is final for the purposes of the preliminary examination unless palpably erroneous in law.' *Ornelas* v. *Ruiz,* 161 U. S. 502, 509.

Necessarily, this is so, for where jurisdiction depends on the merits the decision is not open to collateral attack involving a retrial, although if on the whole record the findings are contradicted, the inquiry as to lack of jurisdiction may be entertained.

In this case the writ of habeas corpus was issued before the examination by the Commissioner had been entered upon, and his jurisdiction was the only question raised. If he had jurisdiction, the District Court could not interfere, and he had jurisdiction if there was a treaty and the commission of extraditable offenses was charged."

This ruling of the Court is conclusive. Couched in the form in which the point has been raised, there is simply nothing to it. The complaint is obviously sufficient. Quite likely the point was put in this form as less distasteful than to have to admit that Factor received £458,500 from the Broad Street Press knowing it to have been fraudulently obtained. Nevertheless; he urges that he should not be extradited because this is not, as counsel allege, a crime in Illinois.

(b) The receiving of money knowing it to have been fraudulently obtained is criminal under the laws of Illinois and the United States.

The demanding government does not hesitate to meet the substantive issue itself, *i. e.*, is it criminal in Illinois to receive money, knowing it to have been fraudulently obtained?

It may be conceded *arguendo* that extradition is granted by the United States only when the act charged is criminal either by a Federal law or by a statute of the state where the accused is found. Under this principle it is not necessary, however, that the name by which the crime is described in the two countries shall be the same, or that the scope of the liability shall be coextensive, or in other respects the same. Absolute identity is not required. It is enough if the essential character of the transaction is the same, or if the particular variety is criminal in both jurisdictions. *Collins* v. *Loisel,* 259 U. S. 309; *Benson* v. *McMahon,* 127 U. S. 457, 462, 466; *Wright* v. *Henkel,* 190 U. S. 40, 58, 61; *Grin* v. *Shine,* 187 U. S. 181, 188; *Powell* v. *U. S.,* 206 Fed. 400, C. C. A.; *In re* Greene, 9 Can. Crim. Cas. No. 254, also 10 Can. Crim. Cas. No. 154; *U. S.* v. *Greene,* 146 Fed. 766; affirmed in 154 Fed. 401, and cer. den. by the United States Supreme Court; *King* v. *Dix,* 18 Times Law Rep. 231; *Reg.* v. *Ganz,* 46 Law Times Rep. 596; *Queen* v. *Gov. of Prison at Halloway,* 16 Times Law Rep. 247; *In re* Arton, 1 Q. B. 507 (1906); *Ex. p.* Thomas, 38 Dom. Law. Rep. 715.

In the case of *Collins* v. *Loisel,* 259 U. S. 309, it was contended on behalf of the fugitive that the statute of India which he was charged with violating amounted to common law cheat only. This Court looked to the statute of Louisiana, where the fugitive was found, covering the

offense of obtaining property by false pretense, and says, page 312:

> "The law does not require that the name by which the crime is described in the two countries shall be the same, nor that the scope of the liability shall be co-extensive, or, in other respects the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions. This was held with reference to different crimes involving false statements in *Wright* v. *Henkel,* 190 U. S. 40, 58; *Kelly* v. *Griffin,* 241 U. S. 6, 14; *Benson* v. *McMahon,* 127 U. S. 457, 465; and *Green* v. *U. S.,* 154 Fed. 401. Compare *Ex parte* Piot, 15 Cox. C. C. 208. The offense charged was, therefore, clearly extraditable."

In the *Collins case* this Court said that in view of the fact that the evidence showed more than a mere broken promise but rather a false pretense, extradition should be granted. It is noted, however, that common law cheat was not an extraditable offense.

In the case of *Wright* v. *Henkel,* 190 U. S. 40, this Court said, page 58:

> "The two statutes are substantially analogous. The making of such a false statement knowingly, under the New York act, carries with it the inference of fraudulent intent, but even if this were not so, criminality under the British act would certainly be such under that of New York. Absolute identity is not required. The essential character of the transaction is the same, and made criminal by both statutes.
>
> It may be remarked that the statutes of several other states agree with that of New York on this subject; and that sections 73 and 74 of the Act of

Congress to define and punish crimes in the District of Alaska, 30 Stat. 1253, c. 429 and section 5209 of the Revised Statutes, in respect of the officers of National Banks, are largely to the same effect as the English statute."

(Page 60) "But it is enough if the particular variety was criminal in both jurisdictions and the laws of both countries included the laws of their component parts."

In the case of *U. S.* v. *Greene and Gaynor,* 154 Fed. 401, the defendants had been extradited from Canada. They were tried in the United States for conspiracy, and it is said, page 405:

"It is contended by counsel that the extradition is for participation in fraud by an agent or trustee, and that the first and second indictments are for conspiracy. That is true, but it is not the whole truth. The conspiracy charged in the indictment is a conspiracy with an agent to defraud. The acts of the defendants charged as constituting the participation in fraud in the extradition are the same acts charged as a conspiracy to defraud in the indictments. While the extradition and the indictment must be for the same criminal acts, it does not follow that the crime must have the same name in both countries. The same crime often has different names in different countries. If the act in question is criminal in both countries and is within the terms of the treaty, nothing more is required. *In deciding whether the indictment charges the same offenses for which the defendants were extradited, the acts of the defendants alleged in the two proceedings must be considered.* It is not a question of names. The technical niceties and distinctions recognized sometimes in criminal law as making a fatal variance cannot be applied." (Italics ours.)

The defendants petitioned this Court for a writ of certiorari, which was denied and in the case of *Collins* v. *Loisel*, 259 U. S. 309, 312, the case was cited with approval.

Clearly, the same latitude in reframing the charge after the surrender without having violated the treaty provisions that the accused may only be tried for the crime for which he was surrendered, must be allowed in determining whether there is a corresponding crime in the asylum country with that alleged to have been violated. Thus in this case, Greene was accessory to the crime of a government officer. This was a charge of an overt act. It came within the treaty crime of participation in fraud by an officer. Conspiracy is said not to be an extraditable crime, yet the Government was permitted to try Greene for conspiracy.

(c) The Illinois Fraudulent Conveyance Act makes it criminal to receive money knowing it to have been obtained by false pretense.

In so far as the words "fraudulently obtained" in the charge against Factor are interpreted as "false pretense," we believe in Illinois there is a statute making it criminal to receive money knowing it to have been thus fraudulently obtained. That statute reads in part as follows:

> "Every person who shall be a party to any fraudulent conveyance of any * * * goods or chattels * * * had, made or contrived, with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages * * * shall be fined * * *." (Sec. 294, Chap. 38, Ill. Rev. Stat.)

It is manifest that under this statute anyone receiving money knowing that it was turned over by one who had

obtained it by fraud and was consequently liable to the defrauded persons, is guilty. Regardless of the receiver's intention, when his act, as it inevitably does, puts it out of the power of the defrauded persons of recovering their money from the defrauder, the receiver is guilty under this statute. His motive may be his purely personal enrichment. The law imputes to him the intent to produce the necessary consequences of his act. The Commissioner in the *Factor case* has found that Factor in receiving money from the Broad Street Press knowing it to have been fraudulently obtained could be committed under this statute. The Commissioner's judgment is final on that point. When it appeared that the Broad Street Press and its agents obtained money by fraud and then transferred it out of their hands, the Commissioner was authorized to infer that the transfer was fraudulent. That would not of necessity be true if the creditors of the Press were merely contract creditors, but the inference is compulsory where the creditors are persons whose money has been obtained by fraud in the first instance. We respectfully submit that this Court cannot say that there was no evidence before the Commissioner upon which he might exercise his judgment.

This Illinois statute embraces in its provisions persons who have claims for libel, deceit, negligence or misapplication of trust moneys, 27 C. J. 476; *Waldradt* v. *Brown*, 6 Ill. 397.

Factor's counsel scarcely analyze this statute, but content themselves with saying that the essence of the fraudulent conveyance act is to prevent fraudulent transfers and the essence of the British statute is the "previous obtaining of the property by the transferor by means of fraud and its receipt with knowledge thereof." We submit that each is intended to make criminal participation

in a crime. Each is intended to take the profit out of crime by penalizing the dealing with criminals. Under the Illinois statute it is criminal to convey property to defraud a person to whom one is liable, and the receiver is also put under the ban of the statute. Manifestly, it is the more reprehensible to convey property that was obtained by fraud. The British statute is likewise directed at substantially the same thing, *viz.*, the penalizing of one who assists in making the criminal's act profitable.

The motive behind the legislation is not determinative of the question under consideration. If extradition were to be refused because the respective law-making bodies did not look at their legislation in the same identical way, then even though narcotic offenses are extraditable, Canada could refuse to honor a demand for an offense because in the United States he is breaking only a revenue law. Surely such technical distinctions as Factor's counsel seek to inject cannot deprive Great Britain of the right to try this accused or relieve our country's obligation to surrender this fugitive who boldly confesses his guilt.

In the case of *Kelly* v. *Griffin*, 241 U. S. 6, 15, this Court held it is criminal in Illinois to receive money knowing it to have been fraudulently obtained and based its decision upon the fraudulent conveyance statute. In the *Factor case* the Circuit Court of Appeals has held that the fraudulent conveyance statute and the British statute on receiving money knowing it to have been fraudulently obtained are sufficiently analogous to require extradition. Opposing counsel do not admit that this Court had the fraudulent conveyance statute in mind when it made this ruling. We question the propriety of re-examining the *Kelly case*, but since opposing counsel have delved into the record itself in an effort to show that what this Court has clearly stated it did not mean, we are forced to do likewise.

Kelly was apprehended in Chicago. The British Consul's complaint (U. S. Sup. Ct. Trans. p. 18) charged him with having committed the following treaty crimes: (1) perjury, (2) obtaining money by false pretenses, and (3) larceny or embezzlement and the receiving of money knowing it to have been embezzled, stolen or fraudulently obtained. In setting out the facts as regard the false pretense charge, the complaint alleged that Kelly obtained for the firm of Thomas Kelly & Sons, from the Province of Manitoba the sum of $1,250,000 on account of pretended extra work done and materials furnished, upon false and fraudulent representations that Thomas Kelly & Sons had put in 35,000 cubic yards of concrete, etc., well knowing that this was false, and that said money was so obtained by false pretense. In setting out the facts as to the third charge, the complaint alleged that Kelley did (1) steal money belonging to the Province, and did also (2) unlawfully receive money of the Province which had theretofore been embezzled, stolen or fraudulently obtained by means of an unlawful and fraudulent conspiracy entered into between said Thomas Kelly, Sir Roblin, Premier, and others, to defraud the Province by means of false and fraudulent contracts for extras and by false and fraudulent estimates as to materials used, and by means of such false and fraudulent schemes Thomas Kelly & Sons, of which firm Thomas Kelly was a member, fraudulently and feloniously obtained $1,250,000 in fraud of the Province.

In order to show that the offenses were criminal in Canada, the deposition of John Allen, Deputy Attorney General of Manitoba, was taken. He cited statutes on theft, receiving property knowing it to have been obtained by an indictable offense, conspiracy to defraud, false pretense and perjury. All of these statutes are of general application. There is not the slightest suggestion that

Kelly had received money from government officials who had committed the fraud. Factor's counsel assert that this was the theory on which the prosecution proceeded, and argue that this explains Mr. Justice Holmes' ruling that it is criminal in Illinois to receive money knowing it to have been fraudulently obtained.

The Commissioner's ruling was as follows:

> "Careful comparison of the two statutes and the complaint, together with the treaty, show the intent of both Canada and Illinois to punish the crimes of perjury, obtaining money by false pretences and larceny or embezzlement and obtaining money knowing the same to have been embezzled, stolen or fraudulently obtained. It cannot be conceived that the statutes of the various countries follow the exact wording or that the treaties in mentioning the crimes follow the wordings of both countries, but, as the Supreme Court has said, in numerous cases that legal definitions of the same crime may vary, yet the purpose and intent of the treaty was to accomplish extradition and the trial on the merits which should follow."

Page 286:

> "* * * In conclusion, I am forced to the decision that the crimes of perjury, obtaining money by false pretences, and larceny or embezzlement and the obtaining of money knowing the same to have been embezzled or fraudulently obtained, are crimes contemplated by the laws of Canada, by the laws of the State of Illinois and by the treaties between the countries."

In the habeas corpus proceeding which followed Kelly's counsel averred in the application for the writ that the charges of larceny and embezzlement were nullified by the

matters in the said complaint alleged as facts to support it (and this is the view which this Court must have taken) and it was further urged that receiving money knowing the same to have been embezzled, stolen or fraudulently obtained, is not criminal in Illinois. The matter came on for hearing before Judge Landis. His opinion is in part as follows:

> "Now I come to the last proposition. The charge in the warrant, in the complaint, is embezzlement, larceny, receiving any money, valuable security or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained. That is to say, under that clause of the treaty of 1889, this man is also sought to be extradited, in addition to the charge of perjury and obtaining money by false pretences. There is a dearth of authority, as far as the argument before me was concerned, and as far as my independent examination of it is concerned, on this particular clause. But in the State of Illinois there is a statute which makes it an offense for a man to receive money which is embezzled by another man. There is a statute which in my opinion makes it an offense for a man to receive money that has been fraudulently obtained to his knowledge by another person from somebody else. 'Every person who shall be a party to any fraudulent conveyance of any lands, tenements or hereditaments, goods or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment or execution, contract or conveyance, had, made or contrived with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts,' etc., 'or who being a party as aforesaid at any time shall wittingly and willingly put in use, avow,' etc., 'or defend the same

or any of them as true, and done, had or made in good faith or upon good consideration, or shall sell or assign, shall be fined $1,000.'

That is the only statute I find in Illinois, strange enough, that meets the situation here. But I haven't the slightest doubt that if the evidence disclosed in this record as to what took place there in conection with the getting of this money, was put before a Court in support of an indictment appropriately drawn under that section, that the Court would be required to refuse to direct a verdict of not guilty.

The Canadian law covers the offense of receiving money obtained by fraud. In Canada it is called a theft. The extradition treaty authorizes the surrender of a person charged with receiving any money, valuable security or other property, knowing the same to have been fraudulently embezzled, stolen or fraudulently obtained. The good faith that must characterize the treatment of a demand by one Government or another Government for the surrender of a fugitive charged with an extraditable offense would not permit the United States, on the showing of fact made here, if there was no charge of perjury and no charge of obtaining money by false pretences, to refuse to give up Kelly on that charge, in my opinion, even though Kelly himself was a party to the fraud, the object and purpose and result of which was separating the Canadian Government from its money."

Thus, Judge Landis placed out of the sphere of dispute what statute he had in mind. The Fraudulent Conveyance Statute he held made the receipt of money knowing it to have been fraudulently obtained, criminal.

This opinion was included in the brief of the demanding government filed in this court. There was not the slightest suggestion of dissent from the enlightened view of Judge Landis, and the inference clearly arises that this Court in affirming his judgment concurred in his reasoning. Mr. Justice Holmes, who wrote the opinion, said (p. 15):

> "The last charge, stealing or embezzling and receiving money fraudulently obtained, needs a word of explanation. It may be assumed that there is no evidence of larceny or embezzlement as (commonly) defined, *but the receiving of property known to have been fraudulently obtained is a crime by the laws of both Canada and Illinois.* There may be a doubt whether the appellant, if a party to the fraud, received the money of the government directly from it, or through a third hand, so as to be guilty under this count of the complaint. We are not prepared to pronounce his detention upon the count unjustifiable, in view of the finding. We assume, of course that the government in Canada will respect the convention between the United States and Great Britain, and will not try the appellant upon other charges than those upon which the extradition is allowed. Therefore, we do not think it necessary to require a modification of the complaint before the order discharging the writ of habeas corpus is affirmed." (Italics ours.)

Commissioner Walker who gave the matter his very careful consideration concluded after extensive argument and long personal examination of the briefs in the *Kelly case* that this Court intended to subscribe to Judge Landis' ruling.

In the *Factor case* Judge Alschuler of the Circuit Court of Appeals in speaking of the *Kelly case* says:

> "Undoubtedly the Supreme Court had before it the opinion of Judge Landis in the District Court wherein he pointed out that the crime alleged was covered in Illinois by the Fraudulent Conveyance Act, Sec. 294, C. 38, Rev. Stat. Ill., and it seems to us that, in the broad sense, the acts charged against Factor if committed in Illinois might be penalized under that section."

Factor's counsel seek to avoid the binding effect of the *Kelly case* by asserting that Mr. Justice Holmes had in mind statutes of the United States and Illinois making it criminal to receive money from government officials knowing that they have obtained it by fraud. It is manifest that the Canadian statutes, which Kelly was charged with having violated, were of general application. It was clearly the intention of the Government to charge Kelly with having obtained the money personally by false pretense, and also with having received money which had been obtained by false pretense. Much the same practice is followed in this country where a defendant is charged with being both the thief and the receiver of the property obtained in the theft. Factor's counsel say that Kelly received money from government officials which they had obtained by fraud. This contention is not supported by the facts. Kelly was charged with obtaining money by false pretense by presenting false estimates. The money, however, was paid by the Province to Thomas Kelly & Sons. There is no foundation for the assertion that government officials received the money and turned it over to Kelly. Opposing counsel seek to confuse the issue by directing attention to various statutes cited in the brief of the demanding government filed in this court. They avoid the simple ex-

planation and resort to some very specious reasoning in an effort to escape the inevitable conclusive that this Court has held that for the purposes of extradition the Fraudulent Conveyance Statute is sufficiently analogous to the Canadian or British statutes on receiving property knowing it to have been obtained by fraud. The statutes referred to in the brief of the demanding government in the *Kelly case* on embezzlement and larceny were cited because of the fact that counsel felt all of these crimes were cognate, and further Kelly was charged with having committed crimes in violation of the following treaty provision: Larceny or embezzlement, and the receiving of money knowing it to have been embezzled, stolen or fraudulently obtained. As there was no evidence of larceny or embezzlement Mr. Justice Holmes very properly remarked that it would be assumed Kelly would not be tried in Canada for these offenses, but would be tried only for receiving money knowing it to have been fraudulently obtained. Mr. Justice Holmes also said that the Court was not prepared to pronounce Kelly's detention unjustifiable even though there might be a doubt whether he received the money from a third hand so as to be guilty under that count or directly from the government and therefore not guilty under that count. Here the Court very properly refused to require the government to make an election. The proceeding in this country was only a preliminary hearing in its nature.

In discharging Factor, Judge Carpenter held that whether receiving money knowing it to have been fraudulently obtained was criminal presented a question of fact. In this case he was clearly in error, and opposing counsel do not except to the ruling of the Circuit Court of Appeals that this was error. Judge Carpenter further guessed that Mr. Justice Holmes in holding that receiving,

etc., was criminal in Illinois really meant that it was criminal here to receive money from government officials knowing it to have been fraudulently taken or embezzled. If we assume this to be true, Judge Carpenter was still in error in discharging Factor, because the very statute which Judge Carpenter felt made it criminal for a government official to fraudulently take money, has a counterpart covering the peculations of private individuals. These two statutes are Sections 389 and 192, Chap. 38, Ill. Revised Stat. Under the Illinois statute on receiving stolen property, the receiver of property obtained in violation of Sections 389 and 192 would be guilty. So if the violation of the one statute justified a ruling that this constituted receiving money knowing it to have been fraudulently obtained, that ruling was for the same reason applicable to the other statute.

With respect to Judge Evans' dissenting opinion it is a little difficult to recognize whether he believes the *Kelly case* was erroneously decided or whether he thinks it correct but distinguishable from the case at bar. He does say he thinks it unsound and open to challenge. He says we have not seriously relied upon the Fraudulent Conveyance Statute. We cannot conceive what has suggested that to him. Not only do we think the statute applicable, but the majority opinion expresses the same view. Commissioner Walker and Judge Dickinson also decided that the statute was applicable. Judge Evans is not very explicit in pointing out the distinguishing features between the *Kelly case* and the *Factor case* which he has in mind.

Judge Evans does not deny that defrauded persons are properly within the class intended to be protected by this Illinois statute. He does not assert that it is impossible to infer that one who has obtained money by false pretense violates this Illinois statute by transferring it to another.

He does not deny that the transferor and the receiver are both guilty. These are the very elements appearing in both the English statute and the Illinois statute. This Court said in *Wright* v. *Henkel,* 190 U. S. 40, 58, that the violation of the English statute carried with it an inference which would thus constitute a violation of the New York statute. The Court should not disturb the inference drawn by the Commissioner.

Judge Carpenter suggested a second explanation of the *Kelly case* based on a Federal statute cited in the briefs. Section 182, Title 18, provides that any banker or person not an authorized depositary who receives money from a United States disbursing officer, otherwise than in payment of a debt, shall be punished. Under such a statute there need be no criminal participation by the federal officer, so that it is difficult to conceive how Mr. Justice Holmes could have meant that as the statute violated when he said it was criminal *by the laws of Illinois* to receive money knowing it to have been fraudulently obtained. We believe this statute further explains the Court's remark that there was no evidence of larceny or embezzlement as commonly defined. The counsel for the demanding government had cited the statute in support of the first part of the third charge alleging that Kelly was guilty of stealing, but to receive money of the government not as an authorized depositary is not the form of larceny "commonly defined." Had the counsel of the demanding government or the Courts been proceeding on the theory that Kelly received money which government officials had fraudulently taken, they would undoubtedly have cited Section 104, Title 18, U. S. C. A. From a thorough examination of the *Kelly case* and the briefs filed by counsel on both sides, the contention is unwarranted that it was the theory that Kelly received money from government officials who had obtained it

by fraud, theft or embezzlement. Kelly was not an accessory to their crime. They were accessories to his crime of obtaining money from the government by false pretense.

The demanding government has relied upon the very plain and direct ruling of this Court. Certainly, Factor's counsel have not pointed out any unsoundness in it or any reason why it should be changed.

(d) The Broad Street Press and its agents acquired property in ways designated in England as "fraudulently obtained", but recognized in Illinois as forms of larceny and embezzlement, in consequence of which Factor was guilty under the Illinois statute of receiving stolen property.

Section 239, Chap. 38, Ill. Rev. Stat. reads in part as follows :

> "Every person who, for his own gain, or to prevent the owner from again possessing his property, shall buy, receive or aid in concealing stolen goods, or anything the stealing of which is declared to be larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained, shall be imprisoned * * *."

This statute is said not to cover the receiving of property knowing it to have been obtained by false pretense. The New York statute looked to in the *Klein case* as corresponding with the English statute is substantially the same as this, but the crime of false pretense is considered in New York to be larceny. Larceny and false pretense are cognate crimes, so much so that in Illinois a prosecution for false pretense will not fail if the evidence happens to show an offense amounting to larceny instead of false pretense (Sec. 228, Chap. 38, Ill. Rev. Stat.). Under

the liberal interpretation of the treaty these two statutes should be held in sufficient correspondence to require the extradition of a fugitive shown to be guilty.

The agents of the Broad Street Press obtained the money of the defrauded persons by falsely holding the Press out as doing a brokerage business. There was no intention on the part of the customers to pass title to their money to the Press, but rather to use their services as a broker. That particular device was therefore not a false pretense. It was a fraud amounting to larceny. The record shows that in fact it owned the Vulcan and Rhodesia shares as principal, and it was not acting as broker. Acting as an agent or broker, it was theft to misrepresent the price at which Vulcan and Rhodesia shares could be purchased and pocket the difference. See 36 C. J. 774; *People* v. *Barnard,* 327 Ill. 305; Sec. 388 Chap. 38, Ill. Rev. Stat.

We submit that the Broad Street Press in certain instances occupied the position of bailee of property turned over to it by its clients. The conversion of this property, the substitution of Rhodesia shares when Vulcan shares had been ordered, the investment of the proceeds of the sale of a listed share in the worthless Vulcan or Rhodesia stock when the client demanded such proceeds all constitute acts of larceny or embezzlement under the Illinois statutes, and hence one cannot receive property so obtained without being guilty under the Illinois statute on receiving stolen property. Sec. 389, Chap. 38, Ill. Rev. Stat.

Under the Blue Sky Act in Illinois, it is embezzlement for any broker to sell the stock of a corporation knowing it to be insolvent. (Sec. 287, Chap. 32, Ill. Rev. Stat.) Being declared to be embezzlement, the Illinois receiving statute prohibits the receiving of the money thus obtained. The Broad Street Press and its agents have clearly vio-

lated this statute. They thus fraudulently obtained the money of their clients. They knew that the Vulcan and Rhodesia companies were insolvent. They never intended that they should be solvent.

The Circuit Court of Appeals holds that Factor could undoubtedly be held under the Illinois Conspiracy Statute. The case of *U. S.* v. *Greene and Gaynor,* 146 Fed. 766 and 154 Fed. 401, is authority for this. Opposing counsel have not excepted to this ruling of the Circuit Court, nor shown any reason why the correspondence is not met by the conspiracy statute.

(e) Under the Criminal Code of the United States any one receiving property knowing it to have been feloniously obtained is guilty.

This statute, Section 467, Title 18, U. S. C. A., was held by the Circuit Court of Appeals to be substantially the same as the English statute. The Court cites *Pettit* v. *Walsh,* 194 U. S. 205 (citing *Wright* v. *Henkel,* 190 U. S. 40), as seemingly against our contention that this Federal statute could apply. We respectfully submit that the two statutes are in substantial correspondence and do apply for the present purpose, when it is realized what that purpose is. The search for a corresponding statute is simply to ascertain that the demanding country is not asking for the surrender of a person for something peculiarly criminal there and not recognized in the asylum country as criminal. Any other purpose is forgetful of the fact that the cause is *coram non judice.* Judge Dickinson speaks of this in his opinion in the *Geen case.* Consequently the limited territory over which the federal statute operates should be no objection to its application in the matter at bar. We do not believe that this Court has held that a Federal statute may not fulfill the alleged treaty require-

ment, but, on the contrary, because of the limited extent of the Federal criminal code, the existence of even a state law was held sufficient.

If we have to search further to find the meaning of "feloniously taken," as used in the statute, we think the mail fraud statute clearly comes within the intended purpose of the statute. (Sec. 339, and Sec. 541 of Title 18, U. S. C. A.) Judge Knox, in the *Klein case,* referred to the striking similarity between mail fraud cases in this country and what was done by the Broad Street Press and its agents. It is no objection to the application of the mail fraud statute that it requires the use of the mails whereas this element is unnecessary in the ordinary false pretense case. In the *Factor case* the mails were used, and applying the ruling in *Collins* v. *Loisel,* 259 U. S. 309, we think that is all that is necessary.

Bearing in mind that our search for a corresponding statute is simply to make sure that Factor is not being charged with something peculiarly criminal in England and not recognized as criminal here, we believe that the Federal code denounces the receiving of money knowing it to have been fraudulently obtained by the swindling device here shown to exist. There is a statute in Illinois on confidence game and swindling operations (Sec. 230, Chap. 38, Ill. Rev. Stat.), which the Federal Government embraces in its criminal code applying to Federal territory in the State of Illinois (Sec. 468, Title 18, U. S. C. A.). As stated above, we do not believe the limited territorial operation of the statute has any bearing on the issue. The fact remains, that the Federal Government would and could punish a person who on its territory in the State of Illinois received money which he knew to have been obtained in a swindle or by virtue of a mail fraud.

Furthermore this federal statute which embraces the

respective state penal codes consequently embraces the statute of the State of New York which Factor's counsel admit makes the receiving of money knowing it to have been fraudulently obtained a criminal offense. Thus the crime being recognized by the Federal law, we certainly cannot interpret our treaty obligation as so shadowy as to be operative in one state but not another. Regardless of the Federal statute, it hardly seems that our government would hold that the treaty was operative in one state and not in another, with the consequence that the fugitive is given the right to decide whether he will or will not extradite himself. Such a ruling would be an unconstitutional discrimination against a citizen of the United States residing in New York and in favor of an alien found in a state which might not have the statute alleged to be required No extradition case has ever failed on this account.

In the case of *Benson* v. *McMahon*, 127 U. S. 457, this Court said, page 466:

> "It certainly does not appear from this that the Mexican authorities intend to be bound in the treaty by any very restricted use of the word 'forgery' when the question concerned an offense of that character committed in Mexico. It is for an offense against Mexican law that the prisoner is held to answer. As he is not now upon final trial, but the only question is whether he has committed an offense for which, according to this treaty, he should be extradited to that country and there tried; *we do not see that in this application to set the prisoner at large, after he has been once committed by an examining Court having competent authority,* and after having been held to answer in Mexico for the offense charged, *that this Court is bound to examine with very critical accuracy*

into the question as to whether or not the act committed by the prisoner is technically a forgery under the common-law. Especially is this so when the wickedness of the act, the fraudulent intent with which it was committed and the final success by which the fraud was perpetrated, are undoubted." (Italics ours.)

We respectfully submit that counsel have not made out such a case as entitles Factor to a review by this Court.

Point II.

No adequate reason is presented why this Court should review the ruling of the Circuit Court that the Dawes-Simon treaty, assuming it to be in effect, does not impair these proceedings.

Factor's counsel say that this question should be reviewed by this Court because it affects not merely the petitioner, but the governments of the United States and Great Britain. Neither government has said there is any dispute about whether or not the treaty is in force. If they can agree on a treaty they can certainly agree when it is in force. It is Factor who is asking the review and it is he who is endeavoring to bring the two governments into conflict with each other. The question is not a judicial one. The Dawes-Simon Treaty provides in part, (Article 18):

"The present treaty shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the High Contracting Parties."

In England a treaty of extradition cannot come into force until an order of the Privy Council has been made

and the order published in the London Gazette. Vol. 8, Butterworth's Comp. Stat. of England, 1929, Extradition Act, Secs. 2 and 5. The Secretary of State of the United States, the American Embassy at London, and the British authorities are all in accord that such order in council is necessary and has not been entered. (Trans. Vol. II, pp. 1242-1246.) Such an order in council has always been necessary to put previous extradition treaties into force. Crandall on Treaties—Their Making and Enforcement, Chap. on Extradition. See also 10 American Journal of International Law, p. 709, 716, 721.

Even assuming the Dawes-Simon Treaty was in force, it would not operate retroactively so as to destroy Great Britain's right to have Factor surrendered. *Ex p.* Dove, 49 F. (2d) 816; *Armstrong* v. *Bidwell,* 124 Fed. 690; *Shepard* v. *N. W. Life Ins. Co.,* 40 Fed. 341, 347; *Kenton* v. *Pontalba,* 40 La. Rep. 342; *Welander* v. *Hoyt,* 176 N. W. 952 (Ia.).

The new treaty embraces all of the crimes enumerated in the old treaties. It was manifestly an attempt to modernize the old treaties. Being simply a revision and not an intended reversal of policy, the new treaty would not apply to pending proceedings. *Gt. Nor. Ry.* v. *U. S.,* 155 Fed. 945, with an elaborate review of cases; *Merlo* v. *Coal Co.,* 258 Ill. 328; Black on Construction and Interpretation of Laws, 2nd Ed. p. 424, 584; 59 C. J. 1181, 1184, 1191.

Viewing extradition as a process based on a statute, the new treaty would not extinguish Factor's liability to be returned provided for under the old treaties. Sec. 29, Title 1, U. S. C. A. It is said a treaty is the law of the land, and in so far as it prescribes a rule determining the rights of citizens, it has the force of law. 26 R. C. L. 926.

The Dawes-Simon Treaty enlarges the provisions of the old by providing for extradition for receiving money know-

ing it to have been stolen or unlawfully obtained. This is not only the fair and reasonable interpretation of the language employed, but it is the construction which Great Britain says was intended. (Vol. II, Trans. p. 1246.) Factor's counsel contend that the rule of *ejusdem generis* limits the words "unlawfully obtained" to crimes in the category of stealing. "Stealing" itself embraces burglary, embezzlement, swindling, false pretense, etc. 59 C. J. 1223.

Factor's counsel have failed to show adequate reason why this Court should review the ruling of the lower Court on this point.

CONCLUSION.

We implore this Court to put an end to the maneuvering of this fugitive to escape trial, by denying this petition for certiorari. He comes not to this Court innocently or with clean hands. Overwhelming evidence establishes his guilt. The point he raises regarding the complaint could and should have been decided in the appeal which he took from Judge FitzHenry's decision. This appeal he abandoned in order that he might bring the Judges of the District Court into conflict. He succeeded; but the Circuit Court reversed the judgment of the District Court, discharging him. His policy of delay in this matter deprives him of the consideration of this Court. His drafting of two Judges of our State Court to appear as witnesses certainly does not stamp him as one whose presence in this country is something to be desired or protected. He sought to uproot a decision of this Court, and endeavored to persuade the Commissioner and the Courts that this Court erroneously decided the *Kelly case*. He literally seeks to retry the *Kelly case*. His every effort has been to bring our own Government and that of Great

Britain into a dispute over his case. He endeavored to discredit the counsel that opposed him in the eyes of the demanding government, and he sought to prejudice the counsel before the Court. But even the demanding government was not spared his onslaught. He charged it with making an abusive use of the treaty, but then abandons the charge. He now pretends solicitude for the relations between the two countries and urges that this Court hold the new treaty is in force when both Governments agree that it is not. He well knows that even the ruling of this Court that the treaty is in force could not give it effect in England, contrary to the laws of that country. Such a ruling would leave the countries without any extradition treaty which both Governments agreed was in force. Consider that this treaty question was raised in December, 1932, after the Court of Appeals had reversed the District Court. The Senate of the United States advised ratification of the treaty in February, 1932. On his staff of counsel was a United States senator, who must have known of the Senate's action, yet the motion was delayed for months.

For almost two years we have labored to bring this fugitive to justice. The demanding government has persevered through some trying situations and earnestly and respectfully awaits the conclusion of the matter. No adequate showing having been made why he should have a further judicial review, it is submitted that the petition should be denied.

Respectfully submitted,

FRANKLIN R. OVERMYER,
Attorney for Demanding Government and United States Marshal.

APPENDIX.

United States, *ex rel.*, Arthur J. Klein, *Complainant* *vs.* Raymond J. Mulligan, Acting United States Marshal, *Respondent*	United States District Court, Southern District of New York. M 13-370 Upon relator's writs of habeas corpus and certiorari.

Max D. Steuer, Esq., attorney for defendant, (Ben Herzberg, Esq., of counsel).

Murray, Hollaman & Lockwood, Esqs., attorneys for His Majesty's Consul General; (Edward H. Lockwood, Esq., and Thomas Gregory, Esq., of counsel.)

KNOX, D. J.

Some of the objections now advanced to the extradition of relator will be overcome if the thought be borne in mind that extradition proceedings are not criminal in their nature, even though punishment may hereafter be imposed upon the relator in the demanding jurisdiction if he shall be convicted of the crime there charged against him. *United States, Ex Rel. Oppenheim* v. *Hecht,* 16 Fed. (2nd) 955. If, then, it be recalled that evidence from England which was introduced upon the hearing before the Commissioner was admissible on this proceeding, even though it would not have been received had relator been charged with an offense against the laws of the country, *Elias* v. *Ramirez,* 215 U. S. 398, slight obstacle to his extradition

will remain. This, too, may be removed by taking into account the fact that negative circumstances relating to the offense charged, as well as positive testimony bearing upon its commission, were doubtless considered by the Commissioner, and properly so. *Elias v. Ramirez, supra.* They may also receive attention here.

With these preliminary observations, it is to be said that the record supports the finding that relator has been satisfactorily shown to have been intimately associated with the operations and activities of Broad Street Press, Ltd., as the same were carried on in the City of London. Not only did he live with Fraser, whose true name seems to have been Factor, but he spent a substantial portion of his time in the offices of the corporation, occupying the "Broad Room" in association with Guest and Green, who were active in carrying out the policies of the company. Not only did relator do this, but he also gave instructions to French, a clerk of Broad Street Press, Inc., as to his duties in that behalf. He likewise "appeared taking an active part in the conduct of the business and in the correspondence". Furthermore, shortly before the corporation ceased to do business, vast sums of money extracted from its bank accounts, through the medium of Wise, who had given relator a power of attorney, came into the latter's control, and were promptly transferred from London to New York to await his arrival. This latter event coincided with efforts on the part of London police authorities to apprehend the relator on a charge of complicity in a conspiracy to defraud in connection with the affairs of Broad Street Press, Inc. While such charge, as originally made, and as later amended, in and of itself, is no proof of wrongdoing on the part of Klein, the time at which it was made is not without a suggestion that his trip to this country had about it some of the characteristics of a flight from England.

That Broad Street Press was a fraudulent enterprise is hardly open to question. Its method of operating in issuing a tipster sheet which, for a time, recommended the purchase of relatively sound securities so as to gain a following, and its action when that object had been attained, of following up contacts with personal advice from the editor recommending the purchase of worthless stocks, is strikingly reminiscent of stock jobbing activities such as are frequently inquired into by the criminal branch of this Court. Indeed, the "Finance" of Broad Street Press, Inc., as the same has been described, together with the manner of its distribution, appears to have had a purpose little short of identical with that revealed regarding the Wall Street Iconoclast, which figured prominently in the case of *United States* v. *Rice, et al.* The fact that "Finance" was edited by someone who went under the assumed name of Norman D. Spencer recalls a similar arrangement that was in effect on the tipster sheet which was used by some of the defendants in the case of *United States* v. *Beadon, et al.*, in the sale of stock in an American mining company pursuant to a plan which a jury has pronounced fraudulent. As in the case last mentioned, the supposed editor of Finance wrote letters, and made telephone calls to the victims of Broad Street Press, Inc., advising the sale of sound securities, and the investment of their proceeds in stocks of a much different character. Furthermore, quite like other mail fraud cases with which this court is acquainted, Broad Street Press, Ltd., when it had effected the sale of a customer's good securities, and such customer had put the money thus realized in the security then being recommended, made strenuous efforts to load him with further shares by setting them "aside" and holding them against a further remittance. In this connection, customers were told that the stock would shortly be listed on the

London Stock Exchanges; that a group of financiers were endeavoring to buy control of the companies; that the stock would soon advance in price, and should not be sold until Spenser so advised. So far as appears, none of the representations materialized, and when customers wished to sell their holdings of the stocks, which now are said to be worthless, they could not do so, and were advised that Spenser had given up the editorship of "Finance" for reasons of "health".

In my opinion, Broad Street Press, Inc., at least over the period from April to October, 1930, and probably during its entire existence, was engaged in the execution of a fraudulent scheme. It is also my belief that Klein was a participant in the scheme.

But, says counsel for relator, assuming that these conclusions be correct, there is as yet no proof that Klein has any portion of the funds which Broad Street Press, Inc., fraudulently obtained from its customers. Beyond this, it is contended that the funds in his possession, for all that is shown in the evidence, may represent the lawful earnings of the Company, and that money in an amount of more than a million dollars can hardly be said to be contaminated because of the fact that in the course of the Company's business funds to the extent of some 1400 pounds, sterling, which may be said to have been obtained by fraud, have been traced into its general deposits.

The answer is, of course, that if I am correct in the conclusions set out above, there is good reason to believe that he participated in the money obtained from the defendants, Stacy, Hedley, Turner and Cochrane. It was between June 11th and 25th, 1930, that Turner purchased stock in Vulcan Copper Mines, Ltd., one of the companies said to be worthless, and it appears from the cash book of Broad Street Press, Inc., that Klein received the sum

of 10,000 pounds sterling on June 26, 1930, and 5,000 pounds on June 30, 1930. Quite conceivably, a part, if not all, of Turner's money was included in such payments. And, insofar as the money received by Klein came from sales of legitimate stock of customers of Broad Street Press, Inc., and which was used in the purchase of fraudulent stock, and at its instance, that is tainted with fraud. While the total quantity of stock thus disposed of is not shown, it is reasonable to suppose that it is large. By this I mean that 100,000 copies of Finance were published weekly, and with this distribution, common knowledge will justify the inference that Stacy, Hedley, Turner and Cochrane are not the only readers of the paper who were similarly defrauded, and that, in the aggregate, the losses of the victims were in large figures. Moreover, if any of Klein's money was fraudulently obtained, and the same has been mixed with legitimate funds, it is not for this Court to separate the good from the bad.

Upon the record as a whole, I think the evidence sufficiently blocks out the elements of the crime charged against the relator, *Collins* v. *Loisel*, 259 U. S. 309, and his writ of habeas corpus is dismissed, and he is remanded to the custody of the Marshal.

JNO. C. KNOX,
U. S. D. J.

February 5, 1931.

Oral Opinion of Hon. Louis FitzHenry, U. S. District Judge, in the Matter of the First Application for a Writ of Habeas Corpus by J. Factor.

The Court: This is a proceeding to remove an alleged fugitive, or to deliver him to the representative of the British Government in the United States, and that under and by virtue of the treaty between Great Britain and the United States of 1889. Under that treaty three elements become very material, and one is just as material as the other.

First, the alleged misconduct of the accused fugitive must amount to the violation of a specific criminal act, a crime denounced by the laws of the country where the misconduct is claimed to have taken place. The next step is extradition for an offense must be expressly referred to in the treaty itself and provided for. And the third provision is that the law of the place where the fugitive is found must also contain or have a criminal law substantially the same as the law of the land where the misconduct is said to have taken place. If there is no criminal statute in England covering the misconduct, that is a failure. If the crime alleged to have been committed is not one covered by the treaty between the respective countries, that is a failure. If there is no law in the locality where the fugitive is found, that is another fatality.

This proceeding raises the question that one of those very material elements is wanting in this case. That is, that there is no law in the State of Illinois, the place where this fugitive, alleged fugitive, is apprehended, covering the offense for which it is sought to have him extradited to the other country. Now, that is the question raised here. If there is a law covering the crime or substantially covering

the crime denounced by the law of England, then there should be extradition. If there is no such law, then extradition does not apply, and this case does not come within the provisions for which provision was made in the convention between the two countries in 1889. So that the whole matter narrows itself down to that single, solitary provision.

I observed in the affidavit that there is no particular allegation that there is a similar law in the State of Illinois, denouncing the particular conduct which is denounced by the criminal provisions of England. But it is not necessary for it to be in the affidavit. Let's see. Maybe I have the wrong one. No, there is no allegation in the affidavit making that charge. Well, that would really be a negligible feature, anyhow, and the Court would, of course, take judicial notice of the statute of the state in which the federal court is sitting.

If this were an original proposition, this Court might and might not hold that there is no law in the State of Illinois denouncing the conduct denounced in the Criminal provisions of the English law. It is extremely doubtful. However, the Court does not feel it necessary or proper to go into a minute review of the criminal laws of the State of Illinois, in the light of the fact that the same identical proposition has heretofore been submitted to the Supreme Court of the United States, *Kelly* v. *Griffin,* 241 United States, on page 6. What is said at the conclusion of that opinion by Mr. Justice Holmes, for whom, of course, not only all judges but all laymen entertain nothing but the very highest regard and the greatest respect, laid down this proposition: "The last charge of stealing or embezzling and receiving money fraudulently obtained needs a word of explanation. It may be assumed that there is no evidence of larceny or embezzle-

ment as commonly defined, but the receiving of property known to have been fraudulently obtained is a crime by the laws of both Canada and Illinois.

So the Court feels that that expression of Mr. Justice Holmes is conclusive upon this Court. If the only court which had held to that effect had been the District Court of the Northern District of Illinois, this Court, sitting in the same jurisdiction, would have no hesitancy upon going into the question as an original proposition. But there is another peculiar and very interesting thing about this Kelly case. Kelly was arrested and extradited upon the charge of committing several crimes against the Dominion of Canada. He was represented in the District Court by one of the ablest members of the bar of this Court, the Hon. John S. Miller, and he was aided as counsel by Mr. Edward Osgood Brown and Mr. Pierce Butler, now Justice Butler of the Supreme Court of the United States. Undoubtedly Justice Butler then of counsel did the best he could in presenting this question to the Supreme Court, and it is not for us at this time even to indulge in the suspicion that the Kelly case might have been slovenly presented to the Supreme Court of the United States, and that consequently what was said by Mr. Justice Holmes near the conclusion of the opinion was inadvertently said.

I might add that the respondent was very ably represented, and the government was very ably represented also in that case by very able counsel.

So the Court feels that the question raised by the motion to strike this petition for writ of habeas corpus has heretofore been passed upon by the Supreme Court of the United States, and it is not for this Court to presume to reverse the Supreme Court of the United States. If that holding is to be changed, it is to be changed by the Supreme Court of the United States itself and possibly, if this case

should get into the Supreme Court of the United States, there might be at least one of the justices who would feel that the opinion in the Kelly case was wrong. Whether somebody else would come to his aid is an altogether different proposition.

There is another very important matter of public policy connected with this case, over and above the legal question involved, and that is, here are two of the greatest countries in the world who have entered into a convention to promote the interests and general welfare of each of the contracting parties. They have made a provision, or sought to make a provision for the extradition of fugitives from justice from the respective countries. Here is a case, that is, this instant case where the identical question presented to this Court on which the writ of habeas corpus is prayed has been before the highest court in the United States, and the exact legal situation examined and defined by that court. In the light of that fact, it is the more desirable that that same court, in the light of our relations with the world and with the other contracting parties, should alone be permitted to change the holding of the government of the United States.

So here we have in the Kelly case a holding by the most exalted authority connected with this government, that a certain legal condition exists in the State of Illinois, and it is such a legal situation as gives the other contracting parties certain rights, and it would simply look ridiculous in the eyes of the world for one of the inferior courts of the United States to presume to overrule the Supreme Court of the United States upon a matter, not of ordinary importance, but one affecting the friendship and the amicable relations which have existed between Great Britain and the United States for a century and a half. So this court, as I say, does not feel that the question is open, does not

feel that it is necessary for the counsel on either side to make any apologies for any expressions that are contained in the opinion in the Kelly case, and so far as the hearing of the matter in the District Court is concerned, the Court knows that the presiding judge who heard that case gave the matter his very careful, earnest and patriotic consideration. So that no apologies are necessary for him.

Feeling as the Court does, that the legal question, the material, necessary legal question involved in the petition for the writ of habeas corpus has been finally adjudicated by the Supreme Court of the United States, the order of this Court will be that the motion to strike petition for writ of habeas corpus from the files will be allowed.

United States of America, *ex rel.*, Harry Geen, *vs.* Walter C. Fetters, U. S. Marshal } In the United States District Court for the Eastern District of Pennsylvania.

In re: Application for the Extradition of Harry Geen, Alias Harry Green.

Sur Hearing.

DICKINSON, J.

A preliminary statement of what we understand to be the record status of this case may clear the desks for action and directly present the rulings to be made. The proceeding concerns one Harry Geen or Green.

The Pre-lie situation, so far as concerns us, is that a scheme is averred to have been devised in London, Eng-

land, to defraud unwitting investors or stocks, and was so far successful as that a large number of people were so defrauded out of sums of money which in the aggregate sound almost fabulous. The money of which these confiding persons were so defrauded was turned over by the guilty parties to the custody of Geen and others who received it knowing it to have been fraudulently obtained. In the vernacular Geen was thus the "fence." Geen and some others came to this Country. Geen came to Philadelphia, and Pennsylvania thus became the State of Asylum. In the viewpoint of those defrauded Geen is thus "a fugitive from justice," from his own viewpoint he is a visitor lawfully here with the right to the protection of our laws. Those who are averred to have fraudulently obtained the moneys received by Geen and who remained in England were there prosecuted, indicted and convicted but the conviction has since been reversed and set aside by the judgment of the Appellate Court on appeal regularly taken. Out of this situation arose the present proceedings. Pending the prosecution in England, the British Counsel here applied for a warrant for the arrest of Geen under the provisions of the Treaties between the United States and Great Britain and the Acts of Congress passed to enforce and carry out the provisions of the Treaties for the extradition of persons who are in this Country charged with violations of the laws of another. The application was made to a judge of this court sitting in the capacity of a committing magistrate. The warrant issued and Geen was arrested.

We do not have present access to the record, but as we understand Geen being thus in the custody of the Marshal has taken two steps towards regaining his liberty.

1. He has entered a motion addressed to the Court sitting as a committing magistrate for his discharge on the

ground that no just cause for his detention has been shown.

2. He has applied to this court for the allowance of a writ of habeas corpus on the ground that he is unlawfully deprived of his liberty.

The same question underlies each of these moves, making each dependent upon the other. If he is discharged after a hearing upon the warrant of arrest, he will have no need for a writ of habeas corpus because he will then be at liberty. If he is what we will call held for extradition the petition for a writ of habeas corpus must be denied because he is in lawful custody. The real question in consequence is should Geen be held for extradition? For convenience we will call him the relator.

It is helpful to have in mind as a starting point that the relator is not charged with an offense against our laws, State or National. Secondly, he is here under and with the full right to receive the protection of our laws nor can he taken from under this protection otherwise than in accordance with law. It is thus clear that we cannot adjudge him to be guilty of any offense nor can we find that there is evidence of his guilt of probable cause in the sense of legal justification to hold him for trial for any offense. The cause in this respect is *coram non judice.* Any State or Sovereignty may, however, limit what is called the right of asylum by providing by law that one in the State, although under the protection of its laws, and guilty of no offense against them, may nevertheless be taken into custody to be removed into the jurisdiction of another State or Sovereign to be there tried for an offense against its laws. Many practices have made us familiar with this. In Pennsylvania, for instance, a warrant may be issued by a Magistrate of one county. It cannot of itself be served in another, but under the provisions of the

law it can be there served if a magistrate of that county shall endorse upon it authority to so serve it. This is familiar to all Pennsylvania lawyers as "backing warrants."

We have another instance of the practice in the provisions of the Constitution of the U. S. for the return of fugitives from the justice of one State who are found in another. Another instance of the practice is that in the proceeding now before us under which, through what are called extradition proceedings, one who has sought asylum in one country may be turned over to the authorities of another to be tried for offenses there committed.

We have indulged in this long preamble to bring out the point that the question before us is primarily not a question of law but of diplomacy.

The United States under its treaty making powers may make such agreements with a foreign government as may be satisfactory to both on the subject of the surrender by one to the other of those charged with crime. Such treaties, however, are not ordinarily self enforcing but each party to a treaty is bound, in the exercise of good faith, to provide by law for the machinery of enforcement.

This brings us to the Treaties between the United States and Great Britain on the subject and the Acts of Congress to carry them into effect. A system might have been provided which did not call for the intervention of the courts. If so, the courts would have been concerned only when one who had been taken into custody and was thus deprived of his liberty appealed to the courts for a writ of habeas corpus or otherwise. The question would then be whether he was thus lawfully deprived of his liberty. The treaty and the law making power might however authorize and call upon the Courts to use their process to arrest the

person sought to be extradited and to certify whether, in the opinion of the Court, such person was the proper subject of extradition proceedings. The latter is what has been done, and the sole function of the Court is to issue arrest process and with the party before it determine and certify whether he is the proper subject of extradition. It is in this sense only that the question before us is a judicial one. What is thereafter done rests with the Executive acting through the Department of State. It is, because of this, that we have said that extradition is a question of diplomacy rather than of law. The Treaty which thus underlies this proceeding is that of 1842 as supplemented in 1889. It would be expected that there might be acts committed which had been denounced as crimes under the laws of one country which nevertheless would not be thought to be extraditable offenses by the other country. Because of this any extradition treaty would define the offenses which were within the treaty. This treaty defines as extraditable the offense of receiving moneys knowing them to have been fraudulently obtained. This is the very offense with which this relator is charged. It may be here interpolated that the offense known as conspiracy is not made an extraditable offense.

We may likewise pause here to discuss a point made in opposition to this extradition. All are agreed that the offense charged must have been made extraditable by the treaty, but it is confidently asserted on behalf of the relator that in addition the offense must be one not only under the laws of the demanding country and be made extraditable by the treaty but must also have been made a crime by the laws of the demanding Country and of the asylum Country. Beyond doubt there is support of this thought to be found in judicial expressions. Indeed, in many of the opinions accompanying rulings made this seems to have

been taken for granted, and in some perhaps the Treaty so provided as that of 1889 does in some instances provide. There is no clear-cut statement upon what the proposition is based. Whether there be such a provision in some of the earlier Treaties we have not taken time to inquire, but it is argued that it cannot be found (as to this offense) in the Treaty of 1889. That Treaty makes the offense here charged extraditable without qualification. It is true that some one or more offenses are so qualified. This instead of extending the provision to the offenses in connection with which it is not mentioned, it is further argued would negative the thought of any such intention. It is likewise true that the Treaty requires in all cases that the "evidence of criminality" be such as under the laws of the Asylum State would justify the holding of the accused for trial for offenses there charged. This, however, it is asserted goes wholly to the question of the evidence of guilt of the offense charged and its weight, and regulates the burden of proof upon the question of "probable cause." It is not a definition of an extraditable offense. As the question presented is in no sense one of guilt but merely aside from that of identity (1) whether the offense charged is extraditable, and (2) whether the evidence justifies the preliminary finding that the accused should be put upon trial, it is argued that the other question of whether the act charged to have been committed has been made an offense under the laws of the Country of Asylum, does not arise. Of course, if it be made by treaty an element of the extraditable offense, or if the Act of Congress passed to carry the treaty into effect required it as a condition of extradition, it must be present, but otherwise it need not be. The Treaty of 1889, it is said, does not call for it. The Treaty, however, does not of itself effectuate all its purposes. The law of the Asylum Country must provide the

machinery for carrying it into effect, and if by inadvertence or otherwise before a warrant of arrest could issue something more than the Treaty required was called for, the warrant could not lawfully issue without a compliance with the Statute. If the purposes of the Treaty were thus defeated the injured Country might denounce the Treaty unless the law was changed, but the magistrate or Court empowered by that law to issue a warrant must follow its provisions. It is said that the Act of Congress (R. S. 5270) under which this warrant issued expressly limits our inquiries to the two mentioned. It is silent on the subject of the one now under discussion.

The general subject has been so often and so thoroughly discussed that further discussion would lend only length. The question of whether the offense to be extraditable must be an offense under the laws of the Asylum State, we leave where the cited cases leave it. What is meant by the rule even when applied, is that an act which is an innocent one under the laws of the Asylum State will not be found to be an extraditable offense, although denounced as criminal by the demanding government. Verbal identity in the definition of the offense in the two Countries is not demanded. It is enough if the act aside from its verbal description is regarded as criminal by the laws of each Country. What is and what is not within the rule as laid down is not altogether clear. The adage that the receiver is worse than the thief is common to England and Pennsylvania. The laws of Pennsylvania make it an offense to receive stolen goods with knowledge of the theft. There are likewise various fraudulent transfers which are made criminal as affecting both grantor and grantee. Law as a science must differentiate acts. Robbery, larceny and embezzlement are however nothing else than different forms of theft. Statutory embezzlement may include acts which

would not be embezzlement at common law. Conspiracy may in itself be made a crime in one Country but not in another unless followed by an overt act. There may thus be an absence of identity in the verbal definition of the same criminal act as found in the laws of the demanding and the Asylum Country, but if an act as described in a Treaty has been made extraditable, it will not be held to be not so merely because the definition of the offense verbally differs from the definition of the same offense found in the law of the Asylum Country.

This phase of the discussion may be summed up in the comment that the law of Pennsylvania denounces the crime of "receiving moneys knowing them to have been fraudulently obtained" quite as nearly as the law of Illinois was found to do in

Kelly v. *Griffin*, 241 U. S. 487.

Passing the points just discussed, we come to the real defense interposed in this case as presented in the very forcible argument adressed to us by counsel for the relator.

It begins with the proposition that no one can be tried for an offense with which he has not been charged and proceeds to the fact that the relator has been charged with the receipt of moneys, all of which came into his hands before a named date, and that there is no evidence that any one had been defrauded of moneys until after the date named. Indeed, the only transactions connected with the defendant were with one man who instead of losing money had in truth and fact made a profit, and further that these transactions were nothing more than the purchase and sale of investment securities of the type known as high class. The argument drawn from this as presented by counsel is unanswerable. The only question thus

becomes, whether the right presentation has been made. The fraud, the fruits of which the relator is charged with having received, was the concept of no common mind. It was based upon the proposition that to defraud those who trust you they must first be induced to confide in you. The plan in consequence was to act first to do what in itself was a legitimate business. When confidence had been thus created and customers had been secured, but not until then, was the trap to be sprung. The intended and fore-doomed victims were lured to the place where the trap was to be sprung by bait, but there was no trap set until they had been attracted in large numbers. The scheme was none the less fraudulent from the beginning and fraudulent before in the loss sense there was any fraud. The reply to this is that to charge the relator with participation in such a scheme is to charge conspiracy, and this is not an extraditable offense. Whenever there is the participation of several persons in a criminal act there is an overlapping. The planning of a crime and agreement to take part in it is a conspiracy, and if the part of one is to act as a purse and caretaker of its fruits, such receiver is a conspirator and accessory as well. If the crime involves a robbery or larceny or the obtaining of the moneys of others through a fraud and money is obtained and received and such receipt has been made a crime and is extraditable, the receiver is not relieved because he has also been guilty of conspiracy. It is an accepted doctrine that the trial of an extradited defendant should be restricted to the crime for which extradited, and each Country trust the other to observe this doctrine.

The conclusion we have reached is in accord with that reached in the cases of Klein and Factor charged with the like offense with which Geen is charged and with the many cases which have been cited to us. The already overgrown

length of this opinion will not permit a discussion of them, but we list a number of the many in the light of which we have made our rulings. These are:

1. The relator should be certified as the proper subject of extradition proceedings and be committed to await Executive action in accordance with the Act of Congress.

2. The petition for a writ of Habeas Corpus should be denied.

Appropriate orders in accordance with this opinion may be submitted.

The cited cases to which reference has been made are as follows:

Bryant v. *U. S.*, 167 U. S. 104.
Collins v. *Loisel*, 259 U. S. 309.
Wright v. *Henkel*, 190 U. S. 40.
Rocca v. *Thompson*, 223 U. S. 217.
Bingham v. *Bradley*, 241 U. S. 511.
U. S. v. Greene, 146 Fed. Rep. 803.
Penna. Criminal Code of 1860, Secs. 120 and 130.

IN THE

COURT OF CRIMINAL APPEAL.

Royal Courts of Justice.

Wednesday, 13th April, 1932.

Before

The Lord Chief Justice of England

(Lord Hewart of Bury)

Mr. Justice Avory

and

Mr. Justice Hawke

Rex

vs.

Arthur Jack Klein

(From the Shorthand Notes of Shedlock & Stammers, 87 Chancery Lane, London, W. C. 2).

JUDGMENT.

THE LORD CHIEF JUSTICE: This Appellant, Arthur Jack Klein, was charged at the Central Criminal Court on an indictment containing twenty-seven counts for receiving moneys knowing them to have been obtained by a conspir-

acy to defraud. The first two counts were concerned with two cheques amounting together to £250,000 received from one Jacob Factor in September, 1930. The remaining counts were concerned with cheques received from what was called the Broad Street Press between the 20th March, 1930, and the 18th August, 1930. The Appellant, who claimed that he had severed all association with Factor in March, 1930, was convicted on the first two counts, that is, the counts relating to the £150,000, and also on Count 6 and Counts 15 to 27; those counts concern sums amounting to £39,316. He was sentenced to twenty-one months' imprisonment in the Second Division, and he now appeals against his conviction.

The trial took up no less than twelve days. It had to do with the activities of a group of what are called share pushing swindlers, some of whose names have been before this Court, and the method was, according to the evidence, a kind of confidence trick, to publish a newspaper purporting to give financial advice, and then by means of that newspaper and through lists of shareholders in public companies, and by letters followed by telegrams, telephone messages and personal canvassing, contact was established with members of the public who happened to own marketable securities. Those persons were persuaded to make some small investment first of all in the respectable Company recommended from the offices of the newspaper, and somehow care was taken to secure a profit for the clients on that first venture, by which the conspirators secured their confidence. In the meantime, the conspirators either by themselves or by others were forming Companies or obtaining by purchase possession of blocks of worthless shares, and they then advised their clients of the wonderful opportunities that were open to them by the purchase of those shares, and they persuaded their clients, who were

now their victims, to exchange their properties for shares of no value. In that way, in the course of a few months many hundreds of thousands of pounds came into the possession of the chief conspirator and the Broad Street Press, which was the Company formed by the conspirators to conduct the newspaper and the swindle.

Now the accusation against the Appellant was that he must have known that the cheques he received from Jacob Factor referred to in Counts 1 and 2 and the cheques he received from the Broad Street Press, that is, the cheques referred to in the main counts upon which he was convicted, were the proceeds of the conspiracy. It was not denied at the trial that a swindle of that character had been perpetrated, and it was said—I say no more than it was said because of events which may hereafter happen—that the leading spirit was Jacob Factor, who also used the names of H. Wise, Walker, Guest and Davies. It was said that he was a man hardly able to write but had what is called a dominating personality, and he surrounded himself with persons who were willing to act as dummy directors and secretaries. The Appellant did not and could not deny that the sums mentioned in the counts in the indictment had passed through his hands. His defence was that he had long done business with Jacob Factor, and that he handled these sums in ignorance of any fraud, and it appears from the exhibits in the case that payments were made to the Appellant to the amount of £313,000. Shortly before a warrant was issued the Appellant went to the United States of America, and he came back as the result of extradition proceedings.

Now Mr. Birkett, who has taken every point that can be taken on behalf of the Appellant, began by criticising the decision of this Court in the case of *Kutas*, which is reported in 17 Criminal Appeal Reports at page 179. His

argument was that the indictment was bad in law inasmuch as it charged that the Appellant had received moneys knowing those moneys to have been obtained in circumstances which amounted to a misdemeanor, namely, conspiracy to defraud. In our opinion the criticism upon the judgment in the case of *Kutas* fails. The Act of 1916 says that the receiving of any property obtained in any way whatsoever under circumstances which amount to a misdemeanor shall be a misdemeanor—words, as was pointed out in the case of *Kutas,* more comprehensive than the words which are to be found in the Larceny Act, 1861. We think, therefore, that the learned Judge was right in holding that the argument based upon that case failed.

Then it was argued that there was a failure here to show that the moneys received by the Appellant were the very moneys which were obtained as a result of the fraud, but to employ that argument was to give the go by to the definition of property in Section 46 of the Larceny Act of 1916. By that section it is provided that property includes, among other things, "not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

The next main point which Mr. Norman Birkett urged was that there was no proof here, or no sufficient proof, that the money received by the Appellant was what he called tainted money, that is money the result of these frauds, but it appears to the Court that it is quite obvious that there were materials entitling the Jury to find that at any rate, to put it upon the lowest ground, some part of the £250,000 referred to in Counts 1 and 2 of the in-

dictment must have been money obtained by fraud in the manner suggested, and that is enough.

Finally it was urged that there was a failure of evidence to prove that the Appellant knew that the moneys had been obtained by fraud. It is not necessary to review the evidence, but in our opinion, not to mention other matters, the evidence of Stirling and the letter of Hohne were in themselves, if the Jury accepted them, conclusive that he did know, and conclusive also that he was wrong in saying that he had severed his associations with Jacob Factor in March of 1930.

We have come to the conclusion, therefore, that there is no ground upon which this Appellant is entitled to succeed, and that the appeal must be dismissed.